SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 1 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 553

BURTON G. HACKNEY, Commissioner of Public Welfare, State of Texas *et al.*,
Appellants

against

MARGARITA MACHADO, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM OR DISMISS

STANLEY BANKS, JR.
940 Milam Building
San Antonio, Texas

LONNIE W. DUKE
606 Majestic Building
San Antonio, Texas

MELVIN N. EICHELBAUM
Bexar County Legal Aid Association
203 West Nueva Street
San Antonio, Texas 78207
Attorneys for Appellees

HENRY F. FREEDMAN
Columbia Center on Social Welfare Policy and Law
401 West 117th Street
New York, N.Y. 10027
Of Counsel

INDEX

Questions Presented 1

Statement of the Case 3

Argument:

I. The statute and regulations issued pursuant thereto are plainly invalid under the prior decisions of this Court 5

II. *Kelly v. Wyman* and *Wheeler v. Montgomery* which are presently before this Court present the same issues as the instant case and this case therefore should be heard at the same time as the *Kelly* and *Wheeler* cases or this appeal should be dismissed 10

Conclusion 12

TABLE OF CASES AND AUTHORITIES

CASES:

Wheeler v. Montgomery, No. 13, O.T. 1969

Kelly v. Wyman, No. 62, O.T. 1969

King v. Smith, 392 U.S. 309 (1968)

Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)

Londoner v. Denver, 210 U.S. 373 (1908)

Opp Cotton Mills v. Administrator, 312 U.S. 126

OPP Cotton Mills v. Administrator, 312 U.S. 126 (1941)

United States v. Illinois Central R.R., 291 U.S. 457, 463 (1934)

OTHER AUTHORITIES:

Social Security Act, Title 42 USC 1301 et seq.

Article III, Sec. 51 (a)

Article 695 (c) Texas Revised Civil Statutes annotated

Rutgers Law and the Welfare State, 59 Columbia Law Review 143, 156 (1959)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 553

BURTON G. HACKNEY, Commissioner of Public Welfare, State of Texas *et al.*,

Appellants,

versus

MARGARITA MACHADO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM OR DISMISS

Appellee moves the Court to affirm the Judgment sought to be reviewed on appeal or in the alternative, to note probable jurisdiction and set this case down for argument with *Wheeler v. Montgomery*, No. 11, O.T. 1969, and *Kelly v. Wyman*, No. 62, O.T. 1969, or in the alternative to dismiss Appellants' appeal, on the grounds set forth below.

QUESTIONS PRESENTED

Appellee contends that the questions presented are adequately stated in Appellants' Notice of Appeal to the Supreme Court of the United States, filed on July 7, 1969, and attached hereto as Appendix A; however, appellee wishes to exercise her prerogative

and restate the questions presented in the following manner:

1. Whether the State Department of Public Welfare, having found after fulsome investigation an individual or family to be needy and in all other respects eligible within the statutory and regulatory scheem for public assistance, and having accordingly provided a regular recurring public assistance grant for food, clothing, shelter and medical services, may, consistent with the purposes and provisions of the Social Security Act, Title 42 U.S.C. §301 *et seq.* and the regulations thereunder redetermine eligibility *ex parte* and abruptly withdraw the subsistance grant without affording the individual so affected an adequate and timely opportunity to be heard on the highly controvertable issues underlying the decision to terminate?

2. Whether a mere confrontation between the welfare recipient and the case worker whereby the latter, after *ex parte* having determined that the former is no longer eligible for public assistance, informs the former of his decision, and whereby the former at which time has no adequate or timely notice, no opportunity to have the benefit of legal counsel, and no adequate opportunity to effectively present his issues or defenses, is a fair hearing as contemplated by the purposes and provisions of the Social Security Act, Title 42 U.S.C. §301, *et seq.* and whether the welfare recipients' public assistance being terminated at the time of the case worker's *ex parte* determination of non-eligibility affords the recipient adequate protection pending the time of a fair hearing and final determination as envisioned

by the purposes and provisions of the Social Security Act, Title 42 U.S.C. §301 *et seq.*"

STATEMENT OF THE CASE

Appellee, Margarita Machado; herein is a recipient of public assistance grants under the federally financed Aid for Dependent Children (AFDC) program, governed by Title IV of the Social Security Act and H.E.W. regulations thereunder, and the State financed program Article III §51a, Constitution of Texas and Article 695 (c), Texas Revised Civil Statutes Annotated. Both programs are a co-operative effort which provide a monthly recurring grant of money for shelter, clothing and food costs for persons who meet the intricate statutory and regulatory qualifications and who are wholly without adequate resources or other means of support and thereby come within the statutory and regulatory definition of needy.

The Appellee herein was found, after investigation and verification, to be fully eligible to receive subsistance grants, and regular recurring grants were paid continuously from December of 1966, until December 31, 1967.

On or about December 6, 1967, Appellee, who had been receiving a public assistance grant of $85.00 per month was contacted by an employee-agent of Appellants, who informed the Appellee that her AFDC public assistance was being terminated and that she was not entitled to receive further assistance because of the fact that she was supposedly in violation of the "man in the house" or "substitute father" regulation.

Appellee did not receive any assistance for the months of January, 1968, and February, 1968, at which time she sought legal counsel, who advised her to make a new application to the Texas State Department of Public Welfare. As a result of such new application, the Appellee was reinstated by the Appellants effective the month of March, 1968, the first new assistance grant being received by her in April, 1968. Also in April, 1968, Appellee petitioned Appellants for an appeal concerning her wrongful termination. An appeal hearing was held in May, 1968, and the matter was considered by the Appeal Board in June, 1968, at which time the action of the case worker was sustained inspite of the evidence showing that although Appellee did have intimate relations with a man from time to time, this man was not contributing to her or her family's support. In April, 1968, Appellee filed her suit herein in the U.S. District Court, Western District of Texas, seeking injunctive and declaratory relief. The case was heard on June 20, 1968, by a three-judge panel which had been specially convened. The three-judge Court issued a *per curiam* opinion on May 12, 1969, wherein it stated:

> "We agree with the results reached in the *Kelly* case, but our holding is predeciate upon the statutory-regulatory aspects of this case, rather than on broad constitutional grounds. See *King v. Smith*, supra, at 313. Adequate protection to the recipient can only be accorded in situations such as those presented in the instant case, by a continuation of the assistance during the period of the appeal and through the end of the month in which the final decision, after the hearing is reached." *Machado, et al v. Hackney, et al*, Civ. No. 68-108, SAC W. D. Texas. (May 12, 1969).

On June 10, 1969, the Court entered its judgment wherein it declared Article 695 (c) §25 and the regulations issued pursuant thereto which authorized and required termination, suspension or reduction of AFDC without affording said recipients a prior hearing, and without affording said recipients a continuation of assistance during the period of appeal and through the end of the month in which the final decision after the hearing is reached, violated the Social Security Act, Title 42 U.S.C., §301 *et seq.* and the regulations promulgated thereunder.

ARGUMENT

The statute and regulations issued pursuant thereto found invalid below are plainly invalid under the prior decision of this Court.

The decision below held that the state statute and the regulation issued pursuant thereto which required termination of public assistance without a prior fair hearing violated the Social Security Act, Title 42 U.S.C. §301 *et seq.* The decision of the Court below was manifestly correct and therefore poses no issue worthy of plenary review in this Court.

Appellants contend that a welfare recipient is entitled to receive benefits only so long as he is a member of a class of persons as defined by Art III, 51a of the Texas Constitution. Appellee agrees with Appellants on this point as far as it goes, however, there is a substantial disagreement as to what point in time a welfare recipient ceases to be a member of the above mentioned class.

Appellants contend that a welfare recipient ceases to be a member of that class when a case worker of the

State Department of Public Welfare has determined, after an *ex parte* investigation, that the welfare recipient is no longer eligible for public assistance and informs the recipient of his decision. Conversly, Appellee contends that after an individual has been fully investigated and found to be eligible by the State Department of Public Welfare and thereby has been qualified in every way to receive public assistance and has received the same in recurrent periodic payments, then such an individual's public assistance grant cannot be terminated by mere arbitrary fiat on the part of the State, but rather such action must be in accordance with the purposes and provisions of the Social Security Act, Title 42 U.S.C., §301 *et seq.*

The welfare recipient has a right to continue to receive public assistance until after a fair hearing and final determination. After that point in time if the welfare recipient is adjudged ineligible, public assistance would of course cease. The disagreement apparently is that appellants consider the welfare recipient to cease to be a member of the said class at that point in time when the said case worker has so decided and informs the recipient of his decision; whereas, Appellee believes that the welfare recipient once legally qualified as a member of the said class continues to be a member of the said class until a final decision to the contrary has been made after a fair hearing. Of course, this presupposes that the welfare recipient disagrees with the case worker's decision and duly files an appeal. Appellee in no way contends that the welfare recipient cannot acquiesce in the case worker's determination by not filing an

appeal. Appellee submits that when the welfare recipient does disagree with the case worker's determination and duly files an appeal, then as the lower court stated:

> "Adequate protection to the recipient can only be accorded . . . by a continuation of the assistance during the period of the appeal and through the end of the month in which the final decision, after the hearing, is reached."

Evidently, the lower Court was aware of the fact that, in order to carry out the purposes and provisions of the Social Security Act, Title 42 U.S.C. §301 *et seq*, it is necessary to assure all citizens the right to a fair hearing which provides them with adequate protection when their bare subsistance is at stake.

Appellants would lead this Court to believe that funds are being paid out in wholesale amounts to individuals who are not members of the said class, and further that this determination of non-membership can be correctly and justly determined by the case worker in an *ex parte* proceeding. The facts, however, do not substantiate such a contention. First of all less than one per cent (.0074) of the recipients who are informed by their case workers that they are no longer eligible and their public assistance will be terminated ever file an appeal. During the year of 1967 this amounted to a total of 644 appeals out of which the case worker was sustained in 227 cases and reversed in 368 cases. In other words, Appellants' contention of the justness and correctness of the case workers *ex parte* decision (what Appellants term the initial hearing) has proven wrong more often than right. Meanwhile, Appellants admit that

the total average lapse of time between a recipient filing an appeal and the implementation of the decision of such an appeal in the case of a reversal is approximately four months (117 days). Without continued assistance during the appeal process, as found necessary by the lower Court, the welfare recipient is faced with lack of adequate food, shelter, clothing and medical care, and then the aid, when it comes (117 days later), may be too late in that it cannot erase the damage that has already been done such as a family breaking up, a boy succumbing to crime in order to feed his family, or a baby dying of malnutrition.

Appellants contend that welfare recipients receive a double hearing in that they blatantly term the case worker's *ex parte* determination of non-eligibility and his notification to the recipient of the same a hearing. Appellee contends that in no sense of the word can the above procedure be a fair hearing as envisioned by the Social Security Act, Title 42 U.S.C. §301 *et seq*, more specifically 42 U.S.C. §602(a)(4).

> "A state plan for aid and services to needy families with children must . . . provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for Aid to Dependent Children is denied or not acted upon with reasonable promptness."

To abruptly terminate the recipient's assistance grant during a period of some four months between appeal, final adjudication and reinstatement of a grant upon reversal of the case worker, is to place the recipient in dire jeopardy. Even if the recipient is right and the case worker wrong (and by Ap-

pellant's own appeal figures this is more often than not the case), the recipient must endure without a grant on which his very subsistance depends. Such a situation does not foster the purpose and intent of the Social Security Act, Title 42 U.S.C. §301 *et seq*, nor does it afford the recipient adequate safeguards and protection.

The conflict of the hearing officer-case worker's conception of the efficient handling of his cases when combined with his concern for protecting his job and the needed safeguard of neutrality in an area of such critical concern as the termination of funds needed for survival is both obvious and fatal in terms of a fair hearing.

Appellants contend that the State Department of Public Welfare should be allowed to arbitrarily terminate the assistance grant of a recipient as long as said recipient is given the opportunity to demonstrate the rightness of her position four months after her assistance was cut off. Such a procedure is the essence of arbitrary action. The lower Court held that the only way to adequately protect the claimant of public assistance was by granting her reasonable notice and opportunity for a fair hearing prior to termination of benefits.

To allow the welfare department to act without such restraint is to tolerate "the play and action of purely personal and arbitrary power", *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) and to leave "one man subject in his essectial interests to the arbitrary will of another man who happens to partake of public power." H. W. Jones, *The Rule of Law and the Wel-*

fare State, 58 Columbia Law Review 143, 156 (1958).

To minimize such arbitrary power and limit arbitrary action, this Court has repeatedly held that where the individual's "essential interests" are at stake, final government action must await opportunity for a hearing. The Court met this issue as early as 1908 in *Londoner v. Denver*, 210 U.S. 373 (1908), which involved the assessment of a municipal street-improvement tax. The taxpayer had the right to be heard "before the tax became irrevocably fixed". 210 U.S. at 385. In *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941), the Court, in upholding the application of the minimum wage standards of the Fair Labor Standards Act to a textile manufacturer, stated that due process does "not require a hearing at the initial stage or at any particular point . . . in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." 312 U.S. at 152-53. Accord, *United States v. Illinois Central R.R.* 291 U.S. 457, 463, (1934).

II.

There is presently pending before this Court two cases which contain basically the same issues as presented in the instant case. They are *Wheeler v. Montgomery*, No. 14 O.T. 1969, and *Kelly v. Wyman*, No. 62 O.T. 1969.

In the *Wheeler* case, the three-judge Court in construing the California practice of terminating assistance to welfare recipients after a confrontation

by the case worker prior to the recipient being given a fair hearing, found that the procedure violated neither the Social Security Act, Title 42 U.S.C. §301 *et seq*, nor the United States Constitution. The three-judge Court in the *Kelly* case, however, faced with almost the exact set of circumstances found that the practice in New York City denied the recipients due process as guaranteed by the Fourteenth Amendment of the United States Constitution. The three-judge Court in the instant case agreed with the results reached in the *Kelly* case but predicated their holding on the statutory-regulatory aspects of the case rather than on broad Constitutional grounds citing *King v. Smith*, 392 U.S. 309 (1968).

Since all three cases deal with the same issues and questions, all three cases should be heard together. However, if the Court fails to set the instant case down for argument with *Wheeler v. Montgomery*, No. 14 O.T., 1969, and *Kelly v. Wyman*, No. 62 O.T., 1969, then Appellee respectfully moves that the Court should dismiss Appellants' appeal in the instant case. By Appellants' own contention, the issues here are substantially the same as in the *Wheeler* and *Kelly* cases. Since the *Wheeler* and *Kelly* cases are advanced on the Dockets of this Court and without the instant case being set down to be heard along with the *Wheeler* and *Kelly* cases, the *Wheeler* and *Kelly* cases will surely be heard before the instant case, and since a determination in the *Wheeler* and *Kelly* cases would be controlling in the instance case thereby making the issues in the instant case moot, Appellee respectfully urges that the Court dismiss the appeal in this case.

CONCLUSION

Appellee's motion to affirm should be granted, or in the alternative, probable jurisdiction should be noted and the case set down to be heard along with *Wheeler v. Montgomery*, No. 14 ..... O.T., 1969, and *Kelly v. Wyman*, No. 62 ..... O.T., 1969, or in the alternative Appellee's motion to dismiss the appeal in this case should be granted.

Respectfully submitted,

C. STANLEY BANKS, JR.
640 Milam Building
San Antonio, Texas

LONNIE W. DUKE
606 Majestic Building
San Antonio, Texas 78205

MELVIN N. EICHELBAUM
Bexar County Legal Aid Assn.
203 West Nueva Street
San Antonio, Texas 78207
Attorneys for Appellee

HENRY F. FREEDMAN
Columbia Center on Social Welfare Policy and Law
401 West 117th Street
New York, N.Y. 10027

Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARGARITA MACHADO, individually and on behalf of her minor children and on behalf of needy, dependent children similarly situated, *Plaintiffs,* VS BURTON G. HACKNEY, Commissioner of Public Welfare, State of Texas, WILL BOND, Chairman of the State Board of Public Welfare, State of Texas; W. KENDALL BAKER, Vice-Chairman of the State Board of Public Welfare, State of Texas; and RAYMOND CHEEVES, Director of Region 4 of the State Department of Public Welfare, State of Texas, *Defendants*	CIVIL ACTION FILE NO: 68-108-SA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that BURTON G. HACKNEY, Commissioner of Public Welfare, State of Texas; WILL BOND, Chairman of the State Board of Public Welfare, State of Texas; W. KENDALL BAKER, Vice-Chairman of the State Board of Public Welfare, State of Texas; and RAYMOND CHEVES, Director of Region 4 of the State Department of Public Welfare, State of Texas; Defendants in the above styled and numbered cause, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on the 10th day of June, 1969. This appeal is taken pursuant to 28 U.S.C. §1253.

II.

The portion of the judgment appealed form by Defendants herein is Paragraph 1, Paragraph 2, and Paragraph 5 which requires the Department of Public Welfare of the State of Texas, to keep recipients of Aid for Dependent Children on the Welfare rolls during the entire period of the administrative appeal, and through the end of the month in which the final decision is reached.

III.

The clerk will please prepare a transcript of the record of this cause for transmission to the clerk of the Supreme Court of the United States and include in said transcript the following:

(1) All pleadings filed in this cause by Plaintiffs, Intervenors, and Defendants.

(2) All stipulations filed in this cause.

(3) All depositions filed in this cause.

(4) Per Curiam opinion of the Court dated the 12th day of May, 1969.

(5) Judgment of the Court dated June 10, 1969.

(6) This notice.

IV.

The following questions are presented by this appeal;

(1) Whether that portion of Article 695 (c) Section 25 of Vernon's Texas Civil Statutes, and the regulations issued pursuant thereto by Defendant, which authorizes and requires termination, suspension or reduction of aid to recipients for Aid for Dependent Children during administrative appeal violates the Social Security Act, 42 U.S.C. Section 301, *et seq*, and the regulations promulgated thereunder.

(2) Whether that portion of Article 695 (c) Section 25 of Vernon's Texas Civil Statutes and regulations issued pursuant thereto by Defendants, which authorizes and requires termination, suspension or reduction of aid to recipients for Aid for Dependent Children during administrative appeal, deprives Plaintiff, MARGARITA MACHADO and Itervenor, LADISLADO LUPE TORRES, of equal protection of the laws secured by the due process clause of the 14th Amendment to the United States Constitution, or whether Article 695 (c) Section 25

Vernon's Texas Civil Statues and the regulations issued pursuant thereto constitute a valid exercise of legislative power.

(3) Whether that portion of Article 695 (c) Section 25 Vernon's Texas Civil Statutes and the regulations issued pursuant thereto by Defendant, which authorizes and requires termination, suspension or reduction of Aid to Recipients for Aid for Dependent Children during administrative appeal, affords a fair hearing to recipients for Aid for Dependent Children or whether the same deprived Plaintiff, MARGARITA MACHADO and Intervenor, LADISLADO LUPE TORRES, of any rights protected by the United States Constitution.

(4) Whether the Lower Court has the right and authority to compel the Comptroller of Public Accounts of the State of Texas to issue a warrant on the Treasury of the State of Texas when such issuance does not have support by pre-existing law required by Section 44 of Article III of the Constitution of the State of Texas and Section 5 or Article VIII of the Constitution of Texas.

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

HAWTHORNE PHILLIPS
Executive Assistant

JOHN H. BANKS
Assistant Attorney General

PAT BAILEY
Assistant Attorney General

ATTORNEYS FOR DEFENDANTS
Box R, Capitol Station
Austin, Texas 78711